No. 47347-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jose Flores-Rodríguez,

Appellant.

Grays Harbor County Superior Court Cause No. 14-1-00346-6

The Honorable Judge Mark McCauley

Appellant's Reply Brief

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I. MR. FLORES-RODRIGUEZ DID NOT RECEIVE A FAIR TRIAL.

A. The prosecutor's flagrant misconduct prejudiced Mr. Flores-Rodriguez.

Respondent concedes that the prosecutor improperly appealed to the jury's passion and prejudice. Brief of Respondent, p. 11. Emotional appeals of this type cannot be cured through an instruction addressed to jurors' rational minds. Because the misconduct prejudiced Mr. Flores-Rodriguez, his convictions must be reversed. *See* Appellant's Opening Brief, pp. 15-17.

In addition, the prosecutor wrongly argued two "facts" not in evidence. This violated Mr. Flores-Rodriguez's right to due process and his right to a jury trial. *In re Restraint of Glasmann*, 175 Wn.2d 696, 704-706, 206 P.3d 673 (2012).

The prosecutor improperly told jurors that Mr. Flores-Rodriguez could have used his PlayStation to communicate via Facebook. RP (1/14/15) 195-96, 218. Mr. Flores-Rodriguez did not testify that his PlayStation could access the internet. RP (1/14/15) 181-182. Nor did he

tell the officers "[M]y PS3, that will do it [connect to the internet]"[1] as the prosecutor claimed in closing. RP (1/14/15) 181-182.

Respondent does not assert that Mr. Flores-Rodriguez or any other witness testified about the capabilities of the PS3. Brief of Respondent, pp. 8-9. Instead, without explanation, Respondent argues that "it is reasonable to infer that the PlayStation 3 was able to access the Internet." Brief of Respondent, p. 9. Respondent does not clarify how Mr. Flores-Rodriguez's testimony (or any other evidence) leads to this conclusion. He did not testify that the machine was able to access the internet; instead, he told the jury that he offered the police his PS3 when they seized his phone and his laptop. RP (1/14/15) 181-182.

Furthermore, the prosecutor did not merely invite jurors to infer that the PS3 could access the internet. Instead, he asserted that the evidence *established* that it could, and thus argued a "fact" that was not in evidence. RP (1/14/15) 195-196, 218.

Likewise, nothing in the record suggested that Mr. Flores-Rodriguez had distributed nude photos of L.M.C. It was improper of the prosecutor to imply that he trafficked in child pornography. RP (1/14/15) 221. Contrary to Respondent's unsupported assertion, the jury did not "already kn[o]w that the photographs had left [Mr. Flores-Rodriguez's]

[1] RP (1/14/15) 218.

control." Brief of Respondent, p. 10. Aside from L.M.C.'s testimony, no evidence suggested that the photos even existed, and nothing suggested that he passed any photos on to anyone else. The jury certainly didn't know that photographs ended up "in the possession of law enforcement, the Prosecutor, defense counsel, and the court." Brief of Respondent, p. 10.

As with the PlayStation remarks, the record did not support the prosecutor's improper arguments regarding the alleged distribution of nude photographs.

The misconduct was highly prejudicial. The prosecutor's statements regarding the PS3 undercut a key element of the defense—the lack of evidence tying Mr. Flores-Rodriguez to the Alan Knot Facebook account. The improper argument suggesting distribution of photographs unfairly painted Mr. Flores-Rodriguez as someone who traffics in child pornography. This misconduct requires reversal. *Glasmann*, 175 Wn.2d at 704-706.

The problem was exacerbated by the prosecutor's improper argument shifting the burden of proof and undermining the presumption of innocence. The state claimed that jurors should not believe Mr. Flores-Rodriguez's denials because he didn't present testimony supporting his account. RP (1/14/15) 217-218. But the defense had no duty to present

evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467-68, 258 P.3d 43 (2011); *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Because the trial came down to a credibility contest between Mr. Flores-Rodriguez and L.M.C., the misconduct prejudiced Mr. Flores-Rodriguez.

The misconduct was flagrant and ill-intentioned, and could not have been cured by instruction. Accordingly, it may be reviewed for the first time on appeal, even absent objection in the trial court. *State v. Walker*, 182 Wn.2d 463, 477-78, 341 P.3d 976 *cert. denied,* 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015).[2]

B. Defense counsel's deficient performance prejudiced Mr. Flores-Rodriguez.

Without any justification, defense counsel failed to seek exclusion of the evidence that Mr. Flores-Rodriguez had herpes, and that he'd transmitted it to Markee without her knowledge. The trial court would likely have granted a motion *in limine* and sustained any objection to testimony on the subject. Respondent concedes that such a motion "may have been sustained." Brief of Respondent, p. 15.[3] The evidence was

[2] Respondent erroneously suggests that, absent objection, prosecutorial misconduct may only be reviewed under the manifest error standard set forth in RAP 2.5(a)(3). Brief of Respondent, pp. 12-13. In fact, the correct standard is the flagrant and ill-intentioned standard set forth in *Walker*.

[3] Respondent notes that Mr. Flores-Rodriguez confirmed that he had herpes during his testimony; however, this occurred only after the subject had been raised by prosecution witnesses.

irrelevant and highly prejudicial. It should have been excluded under ER 401, ER 402, and ER 403.

The same is true regarding L.M.C.'s undiagnosed problem with her mouth. The testimony invited jurors to speculate that Mr. Flores-Rodriguez had passed the disease to the child, even absent any medical evidence.

The error prejudiced Mr. Flores-Rodriguez. Absent the herpes testimony, he had a reasonable probability of obtaining a more favorable result. The herpes testimony tended to undermine his credibility, evoke sympathy for L.M.C., and provoke a strong negative emotional reaction among the jurors. Jurors likely speculated that L.M.C. had herpes, and used this speculation as confirmation of her account.

Furthermore, the prosecutor exacerbated the risk of unfair prejudice by telling jurors that Mr. Flores-Rodriguez "exposed [L.M.C.] to herpes, and he shouldn't walk away from that." RP (1/14/15) 221. This was the last thing jurors heard before deliberations.

Counsel should have sought to exclude the herpes evidence. His failure to do so prejudiced Mr. Flores-Rodriguez.

The same is true regarding counsel's failure to request a limiting instruction relating to allegations of a sexual relationship that occurred when L.M.C. was only 12. Absent such an instruction, jurors likely used

the testimony as propensity evidence. *State v. Saltarelli*, 98 Wn. 2d 358, 363, 655 P.2d 697 (1982); *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986); *see also State v. Russell*, 154 Wn. App. 775, 782-86, 225 P.3d 478 (2010) *rev'd on other grounds*, 171 Wn.2d 118, 249 P.3d 604 (2011).

Furthermore, under the circumstances here, a limiting instruction would not have called additional attention to the evidence. *Cf. State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) *review denied,* 179 Wn.2d 1026, 320 P.3d 719 (2014) ("[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence.") This is so because jurors were excused while the parties argued the objection, and the state explored the issue at length immediately upon the jury's return. RP (1/13/15) 83-117.

Respondent erroneously claims that Mr. Flores-Rodriguez "was not entitled to a limiting instruction." Brief of Respondent, p. 16. This is incorrect. The court allowed the evidence for three limited purposes: to show (1) lustful disposition, (2) "maybe kind of a common scheme or plan," and (3) an ongoing pattern over a prolonged period of time.[4] RP

[4] Appellate counsel inadvertently omitted this third purpose in the Opening Brief. This does not change the underlying argument: that counsel was ineffective for failing to propose a proper limiting instruction. *See* Appellant's Opening Brief, pp. 27-29.

(1/13/15) 111. A proper instruction would have limited the jury's consideration to these three purposes.

This propensity evidence prejudiced Mr. Flores-Rodriguez. Jurors likely concluded that if he did it before, he probably did it this time, too. *See Saltarelli,* 98 Wn.2d at 363; *State v. Fuller*, 169 Wn. App. 797, 830-31, 282 P.3d 126 (2012); *Ramirez*, 46 Wn. App. at 227. *See also United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985). Had Mr. Flores-Rodriguez's attorney requested a limiting instruction, the court would have been obligated to give it. ER 105, ER 404(b); *Russell*, 171 Wn.2d at 122-24.

Defense counsel's inexplicable failure to request a limiting instruction on the prior sex allegations allowed jurors to use the testimony as improper propensity evidence. *See State v. Fisher*, 165 Wn.2d 727, 766, 202 P.3d 937 (2009) ("Failure to request a limiting instruction renders the evidence available to both parties for all purposes.").

Defense counsel also unreasonably failed to object to prosecutorial misconduct. The prosecutor's improper insertion of unproven "facts" undermined the defense theory and painted Mr. Flores-Rodriguez as a person who traffics in child pornography. Likewise, the improper appeals to passion and prejudice and the argument shifting the burden of proof prejudiced Mr. Flores-Rodriguez.

The cumulative effect of these errors denied Mr. Flores-Rodriguez the effective assistance of counsel. The trial came down to a credibility contest between Mr. Flores-Rodriguez and L.M.C. Had counsel performed adequately, Mr. Flores-Rodriguez would likely have been acquitted. Accordingly, his convictions must be reversed and the case remanded for a new trial. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

II. CONSTITUTIONAL AND PROCEDURAL ERRORS VIOLATED MR. FLORES-RODRIGUEZ'S RIGHTS.

A. The trial court improperly continued the trial until long after speedy trial had expired.

Over defense objection, the court continued the case because of court congestion and the state's lack of diligence. *See* Brief of Appellant, pp. 32-40.

Although Respondent asserts that "court congestion was not the problem," the facts show otherwise. Brief of Respondent, p. 20. As Respondent notes, the trial court hoped to begin the trial on November 18 (only 17 days after expiration). Brief of Respondent, p. 17. The only reason trial did not start in mid-November was because the court administrator told defense counsel "there are no trial dates." RP (11/3/14) 8; Brief of Respondent, p. 17. Despite this, the court did not make a record

of the number of courtrooms in use, as required to satisfy CrR 3.3(f)(2) and *State v. Flinn*, 154 Wn.2d 193, 200-201, 110 P.3d 748 (2005).

The court did not make adequate findings in support of its "good cause" rulings. *See* Brief of Appellant, pp. 32-40. The court abused its discretion, requiring dismissal of the charges. CrR 3.3(h); *State v. Kenyon*, 167 Wn.2d 130, 131, 216 P.3d 1024 (2009); *State v. Saunders*, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009).

B. The Information omitted an essential element.

Communicating with a Minor for Immoral Purposes requires proof that the underlying "immoral purpose" involves sexual misconduct. *State v. McNallie*, 120 Wn.2d 925, 932-33, 846 P.2d 1358 (1993). The Information here did not allege that Mr. Flores-Rodriguez communicated for immoral purposes involving sexual misconduct. CP 4. The Information thus omitted an essential element. *McNallie*, 120 Wn.2d at 930-31.

Contrary to Respondent's assertions, the sexual nature of the communication is not merely definitional. Brief of Respondent, pp. 22-23. The requirement that the state prove sexual misconduct is an essential element, derived from the statutory language and the context of the provision. *State v. Schimmelpfennig*, 92 Wn.2d 95, 102-03, 594 P.2d 442 (1979). It is not merely a further definition of "immoral purposes"

required to save the statute from overbreadth or other constitutional infirmity. *Id.*

This defect rendered the charging document constitutionally deficient.[5] *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Mr. Flores-Rodriguez's CMIP conviction must be reversed and the charge dismissed without prejudice. *Id.*

C. The trial court violated Mr. Flores-Rodriguez's double jeopardy right.

The trial court should not have entered convictions for both Communicating with a Minor for Immoral Purposes and for Sexual Exploitation of a Minor. It was not manifestly apparent to jurors that they were required to base each conviction on separate and distinct acts. *See State v. Jackman*, 156 Wn.2d 736, 746-51, 132 P.3d 136 (2006); *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). The ambiguous verdict must be resolved in favor of Mr. Flores-Rodriguez. *State v. Kier*, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008).

Respondent ignores the clear language of *Jackman,* and maintains that convictions for both offenses can *never* violate double jeopardy. Brief of Respondent, pp. 24-25. This is incorrect. Contrary to Respondent's

[5]Compounding this error, the Information cites a nonexistent statute for this count. CP 4.

analysis, the legal elements of the offenses are not dispositive of the test for double jeopardy. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007).

Entry of convictions for both counts violated double jeopardy. The remedy is to reverse the CMIP conviction and remand for resentencing. *Mutch*, 171 Wn.2d at 664.

D. The trial court improperly commented on the evidence.

Respondent concedes that the trial court commented on the evidence. Brief of Respondent, pp. 25-26. Under these facts, the error requires reversal of the aggravating factor. *State v. Brush*, 183 Wn.2d 550, 559-60, 353 P.3d 213 (2015).

The error is presumed prejudicial, and the record must affirmatively show that no prejudice could have resulted. *State v. Levy,* 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). Respondent cannot meet this burden.

Jurors may have disbelieved L.M.C.'s testimony concerning the 2012 incident (which she did not mention to police). RP (1/13/15) 112-115. As a result, jurors were tasked with determining whether a period of a few months comprised a prolonged period of time. As in *Brush,* the

court's comment compelled the jury to conclude that a few months will always qualify as a prolonged period. *Brush,* 183 Wn.2d at 559-60.

Respondent ignores this possibility. Instead, the state argues that it "presented evidence that the abuse had occurred over approximately three years." Brief of Respondent, p. 27. This bare assertion "does not meet the high burden of showing from the record that 'no prejudice could have resulted.'" *Brush*, 183 Wn.2d at 559-60 (quoting *Levy,* 156 Wn.2d at 723). Jurors may have believed L.M.C.'s testimony regarding the recent activity while entertaining reasonable doubts about the prior activity, especially in light of L.M.C.'s failure to mention the prior activity to police. RP (1/13/15) 112-115. Thus, the state cannot show that no prejudice could have resulted.

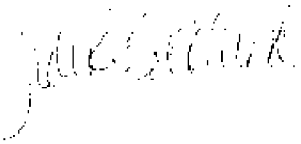
The aggravating factor must be vacated. Mr. Flores-Rodriguez's exceptional sentence must be reversed, and the case remanded for sentencing within the standard range. *Brush*, 183 Wn.2d at 559-60.

CONCLUSION

Mr. Flores-Rodriguez's convictions must be reversed and the case remanded for a new trial. In the alternative, the exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on January 29, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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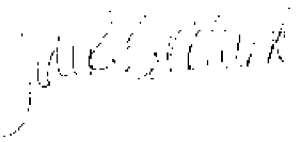
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 29, 2016.



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